No. 91-1524

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IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.4 of the Supreme Court Rules, the Association of American Railroads moves for leave to file the attached Brief of *Amicus Curiae* Association of American Railroads in Support of Petitioner. Respondent Frank J. Eschberger has refused consent to the filing of this Brief of *Amicus Curiae*.

As is more fully set forth in the section of the brief entitled Statement of Interest of *Amicus Curiae*, the Association of American Railroads ("AAR") is a voluntary, nonprofit, unincorporated trade organization. Its members constitute the vast majority of the nation's railroads, operating approximately 85 per cent of the line-haul mileage, producing approximately 93 per cent of the freight revenues, and employing approximately 90 per cent of the railway work force in the United States, with nearly 250,000 employees.

The purposes and concerns of the AAR are railroad operation and equipment. Thus, the interpretation and application of the Safety Appliance Act are matters of importance to the AAR. In the course of the enactment of the Safety Appliance Act, Congress recognized the expertise of the American Railway Association, predecessor of the AAR, in determining what equipment is safe. Indeed, Congress in Section 5 of the Act specifically authorized the American Railway Association to designate to the Interstate Commerce Commission the standard height for drawbars on freight cars throughout the United States, the drawbar being the name of the tongue of the coupler. Act of March 2, 1893, c. 196, §5, 27 Stat. 531 (first sentence omitted as executed) 45 U.S.C. §5. As Senator Cullom, the sponsor of the bill, explained to the United States Senate, the reason for naming the American Railway Association was as follows:

> The American Railway Association is named in the Bill, not especially because it is composed of officers of railroads, but because it is composed of men who make the railroad problem a study and who know just what kind of a car is safe, what kind of an appliance or device ought to be put on, and what ought not to be put on.

24 Cong. Rec. 1276 (1893).

The AAR is concerned with this case, which addresses the question whether uniform, nondefective equipment can create liability under the Safety Appliance Act. The state appellate court incorrectly ruled that nondefective equipment *can* create such liability, holding that a failure of couplers to couple automatically imposes absolute liability, no matter what the reason for the failure to couple. The AAR is also concerned with this case because it exacerbates the conflicting standards for railroad operation and equipment. The state appellate court's imposition of absolute liability directly conflicts with recent holdings of two United States Courts of Appeals. *Reed v. Philadelphia, Bethlehem and New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado v. Missouri P. Ry. Co.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). Moreover, the state appellate court's holding would impose upon railroads a duty to use coupling equipment which has been recognized as virtually nonexistent by at least one United States Court of Appeals. *See United Transportation Union v. Lewis*, 711 F.2d 233, 235 n.5 (D.C. Cir. 1983). In addition, the state appellate court's holding imposes liability upon the railroads for following a procedure of manually aligning couplers which has been explicitly approved by federal governmental regulations. 49 C.F.R. §218.39.

In light of the AAR's recognized expertise in railroad equipment and operation, and the participation of the AAR's predecessor organization in the enactment of the Safety Appliance Act, the AAR respectfully submits that the attached Brief of *Amicus Curiae* will aid this Court in its interpretation and application of the Safety Appliance Act. The AAR therefore moves this Court for leave to file *instanter* the attached brief.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Association of American Railroads ("AAR") is a voluntary, nonprofit, unincorporated trade organization. Its members constitute the vast majority of the nation's railroads, operating approximately 85 per cent of the line-haul mileage, producing approximately 93 per cent of the freight revenues, and employing approximately 90 per cent of the railway work force in the United States, with nearly 250,000 employees.

For over a century, one of the principal purposes of the AAR and its predecessor association has been to bring about uniformity in the equipment that is used to transport freight by rail throughout the United States, Mexico, and Canada. Unlike most foreign railroads, American railroads are not government monopolies. Independent companies own their own railroad cars, right-of-way and equipment, but must be able to interchange and move their cars through other companies' lines when they reach the limits of their own territories. Hence, unless the freight they are carrying is to be unloaded and reloaded, the railroad cars themselves must be interchangeable with all connecting lines to carry the freight to destination. To make such interchange possible, American railroads have for many years required railroad cars to be so constructed as to be able to connect with the railroad cars of other companies. The key to this ready interchange is the type of coupling or connecting device that enables one car to be connected to another.

By the late 1800's, many different kinds of so-called "automatic" coupling devices had been installed by the numerous railroads that then constituted the American

system. (S. Rep. No. 1049, 52d Cong., 1st Sess. 6 (1892) [hereinafter Senate Report].) Over 7,000 patents had been issued. (Senate Report p. 6.) No uniformity in coupling devices existed. (Senate Report p. 5.) The result of this was that when railroad cars reached interchange points with the lines of other railroads, the couplers did not work automatically. Instead, individual coupling efforts had to be made, which usually required railroad employees to go between the cars and manually adjust the fit during the actual coupling of the cars, *i.e.*, while one car was moving toward another. This was a dangerous practice and many railroad men were killed or injured. 24 Cong. Rec. 1275 (1893).

In an attempt to reduce the safety hazards of noninterchangeability, the Master Car Builders Association of the United States (a voluntary association of officers from railroad mechanical departments, and a predecessor organization of the AAR) proposed, as early as 1887, the adoption of a uniform coupler for use on all railroads in the United States. (Senate Report pp. 80-81.) In 1892, legislation providing for uniformity was introduced in the Senate and House, which led in 1893 to the enactment of the Safety Appliance Act ("SAA"). (Senate Report p. 1.) The Act sought, *inter alia*, to impose uniform standards for couplers. After much debate over which type of coupler was best and who exactly should choose it, Congress decided to let the railroads themselves choose the best coupler.[1] Thus, the SAA simply prescribed that cars be "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 45 U.S.C. §2.

[1] "But when it comes to the coupler provision we simply say that a type of coupler uniform in character shall be adopted and three-fourths of the cars of the country shall settle the question of what type that shall be." 24 Cong. Rec. 1329.

Congress recognized the expertise of the American Railway Association, predecessor of the AAR, in determining what uniform equipment is best. Indeed, Congress in Section 5 of the Act specifically authorized the American Railway Association to designate to the Interstate Commerce Commission the standard height for drawbars on freight cars throughout the United States, the drawbar being the name of the tongue of the coupler. Act of March 2, 1893, c. 196, §5, 27 Stat. 531 (first sentence omitted as executed) 45 U.S.C. §5. As Senator Cullom, the sponsor of the bill, explained to the United States Senate, the reason for naming the American Railway Association was as follows:

> The American Railway Association is named in the Bill, not especially because it is composed of officers of railroads, but because it is composed of men who make the railroad problem a study and who know just what kind of a car is safe, what kind of an appliance or device ought to be put on, and what ought not to be put on.

24 Cong. Rec. 1276 (1893).[2]

As Senator Cullom recognized, the purposes and concerns of the AAR are matters of railroad operation and equipment. The AAR is thus intimately concerned with the state appellate court's decision, which casts into doubt the adequacy of a nondefective coupler, uniform with other couplers, to satisfy the requirements of the SAA. The AAR is also concerned with the conflicting

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[2] The requirement that the drawbar be of a standard height has been carried on today into the regulations of the Federal Railroad Administration ("FRA"), 49 C.F.R. Ch. II, Part 232.2. Other requirements of the FRA govern the numerous federal safety standards for railroad cars, including couplers, 49 C.F.R. Ch. II, Section 215.121, 123, 125, 127. The FRA is part of the United States Department of Transportation.

legal standards for railroad equipment, exacerbated because the state appellate court's holding is contrary to recent decisions by the United States Courts of Appeals for the Third and the Fifth Circuits, which have held that a nondefective coupler, which fails to couple automatically because the drawbars were not properly aligned, is *not* a basis for liability under the SAA.[3] *Reed v. Philadelphia, Bethlehem and New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado v. Missouri P. Ry. Co.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987).

Placing absolute liability upon railroads under the SAA, an equipment statute, in a situation where no equipment defect exists, imposes a substantial and improper burden on the railroad industry and interstate commerce. Such a burden is particularly improper where the equipment which would be required by the state appellate court's decision does not even exist, *see United Transportation Union v. Lewis*, 711 F.2d 233, 235 n.5 (D.C. Cir. 1983), and where the procedure which the state appellate court found created liability is *approved* in federal governmental regulations. *See* 49 C.F.R. §218.39.

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[3] Indeed, the court in *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991), specifically noted the conflicts between the United States Courts of Appeals and the state courts on this issue, and the need to have the issue "definitively resolved" by this Court.

II. SUMMARY OF ARGUMENT

The state appellate court held that the failure of railroad cars to couple automatically because the drawbars were misaligned creates absolute liability for the railroad under the Federal Safety Appliance Act, even if the misalignment were *not* the result of any equipment defect. This is a misinterpretation and misapplication of the Safety Appliance Act, which conflicts with the holdings of two United States Courts of Appeals. In addition, the holding that the SAA applies to the adjustment of a drawbar under the circumstances of this case is inconsistent with the approval of this procedure in railroad work, which was considered in 1983 and 1984 as part of the rule-making authority of the Federal Railroad Administration. 49 C.F.R. §§218.39 and 218.41.

III. ARGUMENT

The judgments of the state trial and appellate courts were based upon a finding that the Petitioner, Consolidated Rail Corporation ("Conrail"), violated the Federal Safety Appliance Act when its employee and brakeman, Respondent Frank J. Eschberger, allegedly suffered a back injury while adjusting and centering a drawbar in preparation for coupling. The coupler in the case at bar had no defects. It was uniform with other couplers. The drawbar was not slewed because of any defect in the coupler. The procedure followed by the Respondent for positioning the drawbar was the one specifically mandated by the Federal Railroad Administration, published in the Federal Register, and adopted by the Petitioner railroad as the safe method to follow. (*See* pp. 10-11 *infra.*) The track was pegged and protected from any movement. It was a procedure the Respondent had performed "hundreds and thousands of times" (R. 995.) Coupling occurred automatically upon impact after the drawbar was correctly positioned. (R. 686, 697, 995.)

The state trial court permitted the jury to find a violation of the Safety Appliance Act simply because the drawbar of a coupler had to be manually aligned in order to couple automatically on impact. The state appellate court affirmed the trial court's erroneous ruling, relying upon the fact that "most courts" have imposed liability in similar situations where a railroad worker has suffered injuries while adjusting a misaligned drawbar. However, more recent and well-reasoned federal court decisions interpreting this Court's decision in *Affolder v. N.Y.C. & St. L. R. Co.*, 339 U.S. 95 (1950), have held that liability should *not* be imposed simply because nondefective equipment becomes misaligned and must be manually

adjusted so that automatic coupling occurs. *See Reed v. Philadelphia, Bethlehem & New England R.R. Co., supra,* 939 F.2d at 132; *Maldonado v. Missouri P. Ry. Co., supra,* 798 F.2d at 768.

The lower courts' error was in failing to understand the nature of the Safety Appliance Act, which states in pertinent part that it is unlawful for a railroad to use any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. 45 U.S.C. §2. The legislative history reveals that this provision was designed to address the hazardous situation described as follows:

> A railroad employee . . . is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands . . . . I doubt whether there is a Senator here who can stand deliberately and see a long train coupled in the way the coupling is now done without turning his eyes away as two cars come together just before it is the duty of the car-coupler to make the connection and then get out of the way . . . . This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.

24 Cong. Rec. 1280 (1893).

Thus, Section 2 of the Safety Appliance Act governs the dangerous *act of actually coupling* the cars, *not* the *preparation* for coupling the cars. Specifically, the statute does not prohibit men from going between the cars when the cars are standing still in order to prepare the knuckles and drawbars for couplings, as was the situation in this case.

> I think very few people have lost their lives by coupling inventions between cars when they are at a standstill, but it is the continuous shifting and moving of cars in which the brakeman is expected to do the work under circumstances of great danger.

24 Cong. Rec. 1367.

This Court has recognized the intent of Section 2 of the SAA, holding that the failure of cars to couple on impact is actionable under the SAA only if "the coupler was placed in a position to operate on impact." *Affolder v. NYC & St. L. R. Co., supra,* 339 U.S. at 99. A failure to couple due to negligence in setting the coupler might create liability under the Federal Employer's Liability Act, but it does *not* create liability under the Safety Appliance Act. *Id.* at 101 (Reed, *J.*, dissenting because this should have been made more clear to the jury). And as Mr. Justice Jackson stated, dissenting for the same reason, the charge given in *Affolder* gave the jury the *erroneous* impression "that it need only find that two cars failed to couple on impact to establish a violation of the Safety Appliance Act. *This,* as the court recognizes, *is not the law.* Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted, as such automatic couplers must be, of course, the failure is not that of the device." *Id.* (Emphasis supplied.)

Several recent federal appellate court decisions have relied upon *Affolder* and the legislative history of the SAA in holding that a failure to couple automatically upon impact due to misaligned drawbars does *not* create absolute liability. *Reed, supra,* 939 F.2d at 132; *Maldonado v. Missouri P. Ry. Co., supra,* 798 F.2d at 768. *Cf. United Transportation Union v. Lewis,* 711 F.2d 233, 235 n.5 (D.C. Cir. 1983). The Third Circuit and the Fifth Circuit have held that the railroad should be

permitted to show that the misalignment of the drawbars, and the consequent failure to couple, was caused by something other than defective equipment. *Reed*, 939 F.2d at 132, *Maldonado*, 798 F.2d at 768. For instance, in *Reed* (as in this case) there was evidence that the drawbars were not defective and that the movement of the car along the track could have jarred a drawbar out of alignment. In such a situation, the Respondent's injury while manually adjusting the drawbar in preparation for coupling was not a basis for absolute liability under the Safety Appliance Act.

The act of going between cars before or after coupling is not forbidden by the Safety Appliance Act. The statute only prescribes that the equipment should be such that the actual coupling and uncoupling can occur without men going between cars. Indeed, the legislative history and the regulations interpreting the Act recognize that men must go between cars after the coupling is made in order to fasten the air hoses together.

> Mr. George: *** Is it not necessary that every time a coupling is made, that is a joining of one car to another on the train, there shall also at the same time be a junction of these pipes [air hoses]?
>
> Mr. Peterson: It may be, if necessary to do it; but that is a thing that cannot be done under any other circumstances, and I think the danger is reduced to a minimum by what is proposed. On the other hand, the coupling of the cars is a thing that is done under peculiar circumstances.
>
> For instance, in a yard where cars are being shunted . . . a brakeman . . . is expected to rush in when the car comes to the point of impact and be ready to guide the link and drop the bolt.

24 Cong. Rec. 1367. Thus, the legislative history clearly distinguishes between the dangerous act of coupling while cars are moving and the relatively harmless acts of adjusting air hoses (or adjusting drawbars) while the cars are still.

The Federal Railroad Administration has recognized that it is necessary to go between cars before and after coupling in order to connect air hoses and adjust drawbars, and has issued minimum requirements to be incorporated by all railroads as part of their operating rules. *See* 49 C.F.R. §218.39. This regulation is the result of a joint proposal of the AAR and the United Transportation Union,[4] and controls the very action that took place in this case—adjusting the drawbar portion of the coupling device so a coupling can be made after cars are "humped" into a "bowl." That the adjustment of drawbars is necessary to daily railroad operations, and was to be covered by the regulation, was made clear in the analysis contained in the notice of proposed rule making. *See* 48 Fed. Reg. 45272-73 (Oct. 4, 1983). The final rule was published on February 22, 1984 to become effective on March 23, 1984. 49 Fed. Reg. 6495-6497 (Feb. 22, 1984). The regulation itself recognizes that the action of adjustment of the couplers is required in day to day operations, and specifies what steps shall be taken to protect the person making such adjustments, thus covering the precise situation involved in this case.[5] The regulation provides:

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[4] The United Transportation Union is the nationwide union whose members, on the railroads which are members of the AAR, perform the work of adjusting drawbars.

[5] The fact that the regulation went into effect after Respondent's injury in no way detracts from this argument that the regulation is federal governmental recognition of the necessity that has *always* existed for drawbars to be manually adjusted so that automatic coupling can occur.

> (a) *When a train or engine service employee is required* to couple an air hose or *to adjust a coupling device* and that activity will require that the employee place himself between pieces of rolling equipment located *on a bowl track*, the operator of any remotely controlled switch that provides access from the apex of the hump to the track on which the rolling equipment is located, shall be notified . . .

49 C.F.R. §218.39. (Emphasis supplied.) The rule goes on to specify how the tracks shall then be blocked until the protection is no longer required for the employee.

In accordance with this federal requirement, Rule 1711 of Consolidated Rail Corporation's Safety Rules (R. 2813, Petitioner's Ex. B), which was in effect at the time of Respondent's injury, provides for protection against any approaching equipment when an employee goes between equipment for the purpose of adjustment:

> 1711. Before Fouling, going between or under standing equipment for inspection, *adjustment*, repairs or other purposes:
>
> (a) Arrangements for protection must be originated and terminated only by the employee who follows, goes between or under the equipment
>
> . . .
>
> (f) Equipment must be separated by a distance of at least 30 feet before any *drawbar*, knuckle, hose, or other *between equipment adjustment is made.*

(Emphasis supplied).

The record shows that Respondent came upon the lumber car on Track 61, and observed that its drawbar was slewed and that it was necessary to align the drawbar to place it in a position where coupling could, and did, occur automatically upon impact. The necessity of such a preparatory act in order to permit the couplers to couple automatically is not a violation of the SAA. *See Affolder v. N.Y.C. & St. L. R. Co., supra*, 339 U.S. at 99.

IV. CONCLUSION

Although the Safety Appliance Act is an equipment statute, the state appellate court held that the Safety Appliance Act issue could be submitted to the jury where there was no evidence of defective equipment. Thus, the court permitted the jury to find the railroad liable for the act of its employee in performing a routine adjustment of a drawbar that was not out of line because of any equipment defect. Imposing absolute liability in this situation is contrary to two recent decisions of United States Courts of Appeals.

The FRA has recognized, as did Respondent, that drawbar adjustment takes place thousands of times a day in railroad yards all over the country in order for automatic coupling upon impact to occur. As demonstrated herein, to hold Conrail liable for this act of adjusting a nondefective drawbar is contrary to the language and purpose of the Safety Appliance Act. Indeed, holding railroads liable for this routine act hampers the ability of railroad yards throughout the United States to function. The AAR therefore respectfully requests this Court to grant Petitioner's Petition for a Writ of Certiorari and to reverse the judgments below.

Respectfully submitted,

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